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11 Chapter 11 Trustee for the Bankruptcy Estate of
12 The Litigation Practice Group PC

13 **UNITED STATES BANKRUPTCY COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION**

15
16 In re:
17 THE LITIGATION PRACTICE GROUP P.C.,
18
19 Debtor.

20 Case No.: 8:23-bk-10571-SC

21 Chapter 11

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**NOTICE OF CHAPTER 11
TRUSTEE, RICHARD A.
MARSHACK'S MOTION AND
MOTION FOR ORDER APPROVING
COMPROMISE OF CONTROVERSY
PURSUANT TO FEDERAL RULE OF
BANKRUPTCY PROCEDURE 9019
AS TO DEFENDANT
OPTIMUMBANK AND
OPTIMUMBANK HOLDINGS, INC.;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

27
28 Date: September 12, 2024
Time: 10:00 a.m.
Judge: Hon. Scott C. Clarkson
Place: Courtroom 5C - ViaZoom¹
411 West Fourth Street
Santa Ana, California 92701

¹ Check Judge Clarkson's tentative calendar prior to hearing for further Zoom instructions.

1 **TO THE COURT, HONORABLE SCOTT C. CLARKSON, UNITED STATES**
2 **BANKRUPTCY JUDGE; THE OFFICE OF THE UNITED STATES TRUSTEE, THE**
3 **DEBTOR; AND PARTIES TO THE AGREEMENTS AND THEIR RESPECTIVE COUNSEL**
4 **OF RECORD, IF ANY:**

5 **PLEASE TAKE NOTICE THAT**, on August 22, 2024, Chapter 11 Trustee, Richard A.
6 Marshack (“Trustee”), for the bankruptcy estate of debtor The Litigation Practice Group P.C. in the
7 above-captioned bankruptcy case and the plaintiff in the adversary proceeding *Marshack v. Diab, et*
8 *al.*, [Adversary Proceeding No. 8:23-ap-01046-SC] (“1046 Action”) filed with the United States
9 Bankruptcy Court and served upon parties in interest a motion (“Motion”) for approval of a that
10 certain Settlement Agreement (the “Agreement”) by and between the Trustee, on the one hand, and
11 defendant OptimumBank and OptimumBank Holdings, Inc. (together, “Optimum”), on the other
12 hand, regarding causes of action asserted by the Trustee against Optimum in the 1046 Action.
13 Specifically, the Trustee seeks an order that does the following:

14 1. The Motion is granted;

15 2. Notice of the Motion is adequate and proper;

16 3. The Court reserves jurisdiction to determine any dispute arising in connection with
17 the Proposed Settlement; and

18 4. The Motion is made pursuant to Section 105 of Title 11 of the United States Code and
19 Rule 9019 of the Federal Rules of Bankruptcy Procedure on the grounds that, in Trustee’s sound
20 business judgment, the Agreement is in the best interests of the consumer clients, the Estate and all
21 creditors. (Richard Marshack Declaration ¶ 8.) As a result, Trustee seeks Court approval of the
22 proposed compromise of claims as against Optimum, the salient terms of the Agreement are
23 summarized as follows:

24 (a) As of the Effective Date, Optimum may recoup, set off, or otherwise retain and apply
25 funds in the Reserves to satisfy and pay the Optimum Claim to the extent that it is
26 liquidated as of the Effective Date, and the automatic stay provided for under section
27 362(a) of the Bankruptcy Code, to the extent applicable, shall be modified solely to

1 permit such recoupment and/or setoff, but shall otherwise remain in effect for all
2 purposes. Provided, however, that should Optimum receive from another financial
3 institution a request for a Proof of Authorization related to any Optimum Recoupment,
4 Optimum shall promptly forward it to the Trustee, and the Trustee shall within five
5 business days provide Optimum with any evidence that the Trustee, the Debtor, or an
6 Affiliate has that would satisfy such request. Should the Trustee, the Debtor, or its
7 appropriate Affiliate provide Optimum with evidence sufficient to fully satisfy such
8 request so that it eliminates the Optimum Recoupment, Optimum shall not be entitled
9 to deduct such Optimum Recoupment from the Debtor Reserve.

- 10 (b) The Debtor's Reserve currently holds \$1,000,605.91 in two accounts all of which were
11 acquired post-petition and free of liens. Within ten (10) days following the Order on
12 Trustee's Motion to Compromise, Optimum shall release and pay over to the Trustee
13 all funds (approximately \$800,000), other than \$200,000 that the parties agree
14 Optimum will maintain in the Debtor Reserve pursuant to and during the Optimum
15 Recoupment period and turnover any remaining funds in the Debtor's Reserve at the
16 end of said period pursuant to sections (c) and (d) below.
- 17 (c) Consumer Legal Group, PC ("CLG") is required to provide the Trustee with access to
18 or copies of all Client contracts for which it has initiated ACH transactions pursuant
19 to the Court's Preliminary Injunction. In order to respond to Client chargeback's
20 and/or disputes during the Optimum Recoupment period specified in paragraph 2,
21 above, and for the benefit of consumer clients and the Estate, Trustee hereby
22 authorizes Optimum to have access to and/or be provided a copy of said contracts
23 within ten (10) days of the Court's order approving this Agreement and compromise
24 with Optimum. Thereafter, upon Court approval, CLG shall work diligently with
25 Optimum to provide any additional information Optimum may need to respond to a
26 client chargeback or dispute during the Optimum Recoupment period.

- (d) Within ten (10) business days from the Court's order approving this Agreement and compromise with Optimum and receiving access to or a copy of all service contracts from CLG related to any ACH transaction Optimum processed on behalf of CLG, Optimum shall release and pay over to the Trustee all funds (approximately \$800,000), other than \$200,000 that the parties agree Optimum will maintain in the Debtor Reserve, remaining in any account titled to Debtor or any of its Affiliates. Promptly after May 13, 2026, and subject to Optimum's recoupment and applications of funds as provided in paragraph 2 above, Optimum shall release and pay over to the Trustee any and all funds remaining in the Debtor Reserve, if any, along with an accounting supporting the recoupment against the Debtor Reserve. If at any time after turnover of the funds to the Trustee (as described above) but prior to May 13, 2026, the Optimum Recoupment will exceed the remaining amount held in the Debtor Reserve, Optimum must provide to the Trustee a statement of recoupment with an accounting verifying the recoupment amount, and the Trustee shall pay that amount, not to exceed the approximately \$800,000.00 originally turned over, within 60 days, without need of a further court order. However, if the Trustee disputes the accounting or the recoupment amount, he can at his sole discretion, bring a motion within those 60 days, with the Court so it can determine the validity of the recoupment amount. Optimum agrees that the Court will retain jurisdiction over it to determine this issue if necessary.
 - (e) Trustee shall file a Stipulation of Dismissal as to Optimum pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), made applicable by Federal Rule of Bankruptcy Procedure 7041, within seven days after Optimum's release of funds to the Trustee other than the Debtor Reserve, dismissing with prejudice all known claims as of the time the adversary was filed against Optimum.
 - (f) Except for the obligations created by this Agreement, and in consideration of the execution and delivery of this Agreement, the Parties generally release and fully discharge each other, as well as their predecessors in interest, successors in interest,

1 assignors, assigns, insurers, and their respective officers, directors, shareholders,
2 employees, agents and attorneys, from all known claims, obligations, liabilities,
3 indebtedness, actions and causes of action now existing, and known.

4 (g) The Bankruptcy Court shall retain jurisdiction to enforce and construe the terms and
5 provisions of this Agreement. The Bankruptcy Court shall further retain jurisdiction
6 to enforce and construe any and all applicable terms or provisions of the Court's
7 Preliminary Injunction (Adversary Proceeding No. 8:23-ap-01046-SC, Dkt. No. 70),
8 including any and all applicable changes or modifications subsequently made so long
9 as the Preliminary Injunction remains in place and has not been vacated by Court
10 order.

11 (h) This Agreement is subject to approval by the Bankruptcy Court.

12 **PLEASE TAKE FURTHER NOTICE** that the Motion is made pursuant to Rule 9019 of
13 the Federal Rules of Bankruptcy Procedure, 11 U.S.C. § 105, and Rules 2002-1 and 9013-1 of the
14 Local Bankruptcy Rules for the Central District of California ("LBR") on the grounds that the
15 proposed Agreement resolves certain claims asserted by the Trustee against Optimum. The Trustee
16 believes that the proposed settlement is in the best interest of the Estate as more fully discussed in the
17 Memorandum of Points and Authorities attached to the Motion.

18 **NOTICE IS FURTHER GIVEN** that this Motion is based upon (a) this Notice of Motion
19 and Motion, (b) the attached Memorandum of Points and Authorities, (c) Declaration of Richard
20 Marshack and exhibits thereto, (d) Declaration of Jeremy B. Freedman, (e) Declaration of Timothy
21 Terry on behalf of OptimumBank and OptimumBank Holdings, Inc. and Exhibits thereto which will
22 be submitted prior to the hearing listed above on behalf of, (f) the concurrently filed Notice of Motion
23 and Hearing, (g) the arguments of counsel, if any, in support of the Motion at the hearing thereon, (h)
24 the pleadings on file in Debtor's bankruptcy case and in the 1046 Action of which the Court is
25 requested to take judicial notice, and (i) any other evidence presented to the Court in support of the
26 Motion.

27 ///

NOTICE IS FURTHER GIVEN that a hearing to consider the Motion will take place before the Honorable Scott C. Clarkson in Courtroom 5C of the United States Bankruptcy Court, located at 411 West Fourth Street, Santa Ana, California 92701, on **September 12, 2024 at 10:00 a.m.**

PLEASE TAKE FURTHER NOTICE that, pursuant to LBR 9013-1(f), any response or opposition to the Motion must be (i) in writing and include a complete written statement of all reasons in opposition thereto or in support or joinder thereof, declarations and copies of all photographs and documentary evidence on which the responding party intends to rely and any responding memorandum of points and authorities, and (ii) filed with the Court and served on the Trustee, counsel for the Trustee, the Debtor, and the United States Trustee no later than 14 days prior to the hearing on this Motion.

NOTICE IS FURTHER GIVEN that written opposition to the Motion must be filed with the Court no later than **August 29, 2024**.

PLEASE TAKE FURTHER NOTICE that any party wishing to appear at the hearing should review the Court's tentative ruling prior to the hearing, which will provide information on whether in-person appearances are required and any remote access information for the hearing on the Motion. Parties are directed to obtain accessibility information on Judge Clarkson's posted hearing calendar which may be viewed online at: <http://ecfciao.cacb.uscourts.gov/CiaoPosted/?iid=SC>.

PLEASE TAKE FURTHER NOTICE that, pursuant to LBR 9013-1(h), the failure to file and serve a timely response to the Motion or request a hearing on the Motion may be deemed by the Court to be consent to the granting of the relief requested in the Motion.

Dated: August 22, 2024

Respectfully submitted,

DINSMORE & SHOHL LLP

By:/s/ *Jeremy B. Freedman*

Christopher B. Ghio

Jeremy B. Freedman

Special Counsel to Richard A. Marshack

Chapter 11 Trustee for the Bankruptcy Estate of The Litigation Practice Group PC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 By this Motion, Trustee seeks the Court's approval of a Settlement Agreement (the
5 "Agreement") with Optimum for the return of The Litigation Practice Group, PC ("Debtor" or
6 "LPG") assets acquired post-petition. The Agreement requires Optimum to release to the Trustee: 1)
7 funds remaining in LPG's Reserve (defined below) in the amount of \$800,000 within ten (10) days
8 of the Court's order approving the Agreement and upon being provided access to and/or copies of
9 CLG client contracts for any client file optimum has processed an ACH transaction, less \$200,000
10 that the Parties agree Optimum will maintain in the LPG Reserve, and 2) after May 13, 2026, and
11 subject to Optimum's recoupment and applications of funds, Optimum shall release and pay to the
12 Trustee any and all funds remaining in the LPG Reserve, if any, along with accounting supporting
13 the recoupment against the LPG Reserve. In Trustee's sound business judgment, he believes
14 approving the Agreement is in the best interests of the Estate and its creditors because it will satisfy
15 the pre-petition claims of a significant creditor while providing for the recovery of Estate Property,
16 both without the need for further litigation or ongoing review by this Court. (Richard Marshack
17 Declaration ("Marshack Decl.") at ¶¶ 6-8.)

18 **II.**

19 **BACKGROUND**

20 On March 20, 2023, Debtor filed a voluntary petition for relief under Chapter 11 of the
21 Bankruptcy Code in the United States Bankruptcy Court for the Central District of California,
22 initiating Case No. 8:23-bk-10571-SC. On May 8, 2023, Richard A. Marshack was appointed as
23 Chapter 11 Trustee of Debtor's Bankruptcy Estate and assumed all authority to administer Debtor's
24 Estate in this case. (Bankr. Dkt. No. 65).

25 On May 25, 2023, Trustee filed his complaint for injunctive relief, fraudulent conveyance and
26 turnover initiating Adversary Proceeding No. 8:23-ap-01046-SC ("1046 Action") as to over forty
27 defendants. (1046 Action Dkt. No. 1.)

1 Optimum performed certain ACH payment processing services for the Debtor and its
2 “Affiliates” (namely, LGS Clearinghouse LLC, KLYR Capital Inc., Collegg LLC dba Phoenix LG
3 Fee, and Consumer Legal Group PC) pursuant to an agreement between the Debtor and Optimum
4 dated June 12, 2022 (“Debtor ACH Client Agreement”). (Timothy Terry Declaration on behalf of
5 Optimum (“Optimum Decl.”); Marshack Decl. at Exh. A, ¶ C).

6 The Debtor ACH Client Agreement (i) authorized and permitted Optimum to establish and
7 maintain a reserve (the “Debtor Reserve” or “LPG Reserve”) to cover certain of the Debtor’s
8 obligations under their ACH Client Agreement, and also (ii) required Debtor and its Affiliates to
9 indemnify Optimum for any and all expenses, including attorneys’ fees, arising (directly or indirectly)
10 out of or related to their ACH Client Agreement. (Optimum Decl.; Marshack Decl. at Exh. A, ¶ B.)

11 The Debtor Reserve currently holds approximately **\$1,000,605.91** in two accounts: (i)
12 \$1,000,002 in account number xxx8253 titled to Consumer Legal Group PC and labeled Consumer
13 Legal PC Reserve Acct and (ii) \$603.91 in account number xxx5282 titled to KLYR Capital Inc. and
14 labeled KLYR Capital Inc. Reserve Account. The funds held in the Debtor Reserve were acquired
15 *post-petition*. (Timothy Terry Decl. on behalf of Optimum; Marshack Decl. at Exh. A, ¶ C;
16 Declaration of Jeremy Freedman (“Freedman Decl.”) at ¶¶ 2-3.)

17 Optimum has a right of recoupment against the Debtor’s Chapter 11 Estate Funds and the
18 Debtor Reserve to the extent of any unpaid and/or unrecouped client refunds, chargebacks and ACH
19 returns on transactions with, or indemnifiable expenses (including, but not limited to, fines or
20 penalties assessed by NACHA or a similar organization) related to, the Debtor and its Affiliates (the
21 “Optimum Recoupment”). (Optimum Decl.; Marshack Decl. at Exh. A, ¶ B). The chargeback limits
22 for poor performing transactions pursuant to NACHA range between five percent (5%) and fifteen
23 percent (15%).² NACHA maintains a 15% overall return rate floor on ACH transactions for
24 regulatory compliance.³ Optimum, however, has historically experienced a chargeback rate
25

26 ² See chrome-extension://efaidnbmnnibpcajpcgclefindmkaj/https://www.nacha.org/system/files/2024-
27 01/Calculate_Admin_or_Overall_Return_Rate.pdf (Last accessed 8/13/2024).

28 ³ *Id.*

1 exceeding 20% on CLG ACH transactions. (Optimum Decl.) This resulted in Optimum cancelling its
2 service contract with CLG. Based thereon, the Parties have agreed to compromise the amount
3 Optimum shall be entitled to holdback to cover potential chargebacks on CLG ACH transactions
4 during Optimum Recoupment period ending May 23, 2025 in the amount of \$200,000. (Marshack
5 Decl. ¶ 5(iv)-(vi).)

6 To facilitate Optimum's handling of disputes and chargebacks during the Optimum
7 Recoupment period, the Trustee has authorized Optimum to receive access to and/or copies of CLG's
8 client contracts for those clients Optimum has processed ACH transactions. (Marshack Decl. ¶ 5(ii).)
9 The Trustee is entitled to such contracts pursuant to this Court's Preliminary Injunction Order. Such
10 contracts are necessary to prove the ACH transaction was authorized and properly handled, which
11 shall benefit consumer clients and the Estate by reducing the amount of chargebacks during the
12 Optimum Recoupment period and increase the amount funds remaining out of the \$200,000 being
13 held back. (1046 Action Dkt. No. 70; Marshack Decl. ¶ 5(ii)). As such, the Parties further seek Court
14 approval of the turnover of CLG's contracts to Optimum within ten (10) business days of the Court's
15 Order on Trustee's Motion to Compromise and continue to have a duty to diligently work with
16 Optimum to provide records reasonably necessary to respond to client chargebacks and/or disputes
17 during the Optimum Recoupment period. (Marshack Decl. ¶ 6, Exh. A.)

18 On June 15, 2023, October 23, 2023, and April 26, 2024, the Trustee filed an Amended
19 Complaint (1046 Action Dkt. No. 62), Second Amended Complaint (1046 Action No. 226), and Third
20 Amended Complaint (1046 Action Dkt. No. 506), respectively, for (1) Injunctive Relief; (2)
21 Avoidance, Recovery, and Preservation of Two-Year Actual Fraudulent Transfers; (3) Avoidance,
22 Recovery, and Preservation of Two-Year Constructive Fraudulent Transfers; (4) Avoidance,
23 Recovery, and Preservation of Four-Year Actual Fraudulent Transfers; (5) Avoidance, Recovery, and
24 Preservation of Four-Year Constructive Fraudulent Transfers; and (6) Turnover, as part of the
25 adversary proceeding against Optimum, captioned *Richard A. Marshack v. Tony Diab, et al.*, No.
26 8:23-ap-01046-SC. Trustee filed the Fourth Amended Complaint on June 28, 2024. (1046 Action
27 Dkt. No. 583.) The Fourth Amended Complaint is the operative complaint as of this filing. (*Id.*)
28

On June 23, 2023, in the 1046 Action (Dkt. No. 70), the Court issued its Preliminary Injunction order directing Client files, including but not limited client contracts, and certain funds being held on behalf of the Debtor and related entities and individuals be “turned over” to the Trustee (the “Estate Funds”).

5 The Parties wish to stipulate and agree to a limited and precautionary relief from the automatic
6 stay, if and as necessary, to allow Optimum to exercise its right of recoupment and/or setoff in respect
7 to the Reserve, to apply funds in the Reserve to cover its losses on pre-petition transactions by
8 Debtor's clients to date, and then to release any funds remaining in the Reserve to the Trustee as set
9 forth in the Agreement.

III.

TERMS OF THE SETTLEMENT

12 The salient terms of the Settlement Agreement attached to the Declaration of Richard
13 Marshack, concurrently filed herewith as **Exhibit A**, are as follows:

14 (a) This Agreement shall be effective on the date (the “Effective Date”) that the
15 Bankruptcy Court enters a final order in the Bankruptcy Case (i) approving the
16 Agreement and (ii) finding that no party other than the Trustee has any right, title, or
17 claim to the funds remaining in the Debtor Reserve following the recoupment and/or
18 setoff described in paragraph 2 below (the “Settlement Order”). If any party objects
19 to the Settlement Order, then the Settlement Order shall not be a final order until the
20 time for appeal or reconsideration, or to seek permission to appeal from the
21 Bankruptcy Court’s approval of this Agreement, has expired or, if appealed, the
22 Settlement Order has been affirmed in its entirety by the court of last resort to which
23 the appeal has been taken and has become no longer subject to further appeal or
24 review. If no party objects to the Settlement Order, the Settlement Order will be final
25 upon entry by the Bankruptcy Court. (Exhibit A at ¶ 1.)

26 (b) As of the Effective Date, Optimum may recoup, set off, or otherwise retain and apply
27 funds in the Reserves to satisfy and pay the Optimum Recoupment to the extent that

1 it is liquidated as of the date of recoupment, set off, or other retention, and the
2 automatic stay provided for under section 362(a) of the Bankruptcy Code, to the extent
3 applicable, shall be modified automatically solely to permit such retention,
4 recoupment, and/or setoff, but shall otherwise remain in effect for all purposes.
5 Provided, however, that should Optimum receive from another financial institution a
6 request for a Proof of Authorization related to any Optimum Recoupment, Optimum
7 shall promptly forward it to the Trustee, and the Trustee shall within five business
8 days provide Optimum with any evidence that the Trustee, the Debtor, or an Affiliate
9 has that would satisfy such request. Should the Trustee, the Debtor, or its appropriate
10 Affiliate provide Optimum with evidence sufficient to fully satisfy such request so
11 that it eliminates the Optimum Recoupment, Optimum shall not be entitled to deduct
12 such Optimum Recoupment from the Debtor Reserve. (Exhibit A at ¶ 2.)

13 (c) CLG is required to provide the Trustee with access to or copies of all Client contracts
14 for which it has initiated ACH transactions pursuant to the Court's Preliminary
15 Injunction. In order to respond to Client chargeback's and/or disputes during the
16 Optimum Recoupment period specified in paragraph 2, above, and for the benefit of
17 the Estate, Trustee hereby authorizes Optimum to have access to and/or be provided a
18 copy of said contracts within ten (10) days of the Court's order approving this
19 Agreement and compromise with Optimum. Thereafter, upon Court approval, CLG
20 shall work diligently with Optimum to provide any additional information Optimum
21 may need to respond to a client chargeback or dispute during the Optimum
22 Recoupment period. (Exhibit A at ¶ 3.)

23 (d) Within ten (10) business days from the Court's order approving this Agreement and
24 compromise with Optimum and receiving access to or a copy of all service contracts
25 from CLG related to any ACH transaction Optimum processed on behalf of CLG,
26 Optimum shall release and pay over to the Trustee all funds (approximately \$800,000),
27 other than \$200,000.00 that the parties agree Optimum will maintain in the Debtor
28

1 Reserve, remaining in any account titled to Debtor or any of its Affiliates. Promptly
2 after May 13, 2026, and subject to Optimum's recoupment and applications of funds
3 as provided in paragraph 2 above, Optimum shall release and pay over to the Trustee
4 any and all funds remaining in the Debtor Reserve, if any, along with an accounting
5 supporting the recoupment against the Debtor Reserve. If at any time after turnover of
6 the funds to the Trustee (as described above) but prior to May 13, 2026, the Optimum
7 Recoupment will exceed the remaining amount held in the Debtor Reserve, Optimum
8 must provide to the Trustee a statement of recoupment with an accounting verifying
9 the recoupment amount, and the Trustee shall pay that amount, not to exceed the
10 approximately \$800,000.00 originally turned over, within 60 days, without need of a
11 further court order. However, if the Trustee disputes the accounting or the recoupment
12 amount, he can at his sole discretion, bring a motion within those 60 days, with the
13 Court so it can determine the validity of the recoupment amount. Optimum agrees that
14 the Court will retain jurisdiction over it to determine this issue if necessary. (Exhibit
15 A at ¶ 4.)

16 (e) The Trustee shall file a Stipulation of Dismissal of Optimum pursuant to Federal Rule
17 of Civil Procedure 41(a)(1)(A)(ii), made applicable by Federal Rule of Bankruptcy
18 Procedure 7041, within seven days after Optimum's release of funds to the Trustee
19 other than the Debtor Reserve, as described in paragraph (c), above, dismissing with
20 prejudice all known claims as of the time the adversary was filed against Optimum.
21 (Exhibit A at ¶ 5.)

22 (f) Except for the obligations created by this Agreement, and in consideration of the
23 execution and delivery of this Agreement, the Parties generally release and fully
24 discharge each other, as well as their predecessors in interest, successors in interest,
25 assignors, assigns, insurers, and their respective officers, directors, shareholders,
26 employees, agents and attorneys, from all claims, obligations, liabilities, indebtedness,
27 actions and causes of action now existing, and known. (Exhibit A at ¶ 6.)

(g) The Bankruptcy Court shall retain jurisdiction to enforce and construe the terms and provisions of this Agreement. The Bankruptcy Court shall further retain jurisdiction to enforce and construe any and all applicable terms or provisions of the Court's Preliminary Injunction (1046 Action Dkt. No. 70), including any and all applicable changes or modifications subsequently made so long as the Preliminary Injunction remains in place and has not been vacated by Court order. (Exhibit A at ¶ 13.)

IV.

THE COURT IS AUTHORIZED TO APPROVE THE SETTLEMENT

9 The authority granted to a trustee to compromise a controversy or agree to a settlement is set
10 forth in Federal Rule of Bankruptcy Procedure 9019(a) (“Rule 9019”), which provides in pertinent
11 part that “[o]n motion by the [Trustee] and after notice and a hearing, the court may approve a
12 compromise or settlement.” Under these circumstances, the decision of whether a compromise should
13 be accepted or rejected lies within the sound discretion of the court. *In re Carson*, 82 B.R. 847, 852
14 (Bankr. S.D. Ohio 1987); *In re Hydronic Enterprise, Inc.*, 58 B.R. 363, 365 (Bankr. D. R.I. 1986); *In*
15 *re Mobile Air Drilling Co., Inc.*, 53 B.R. 605, 607 (Bankr. N.D. Ohio 1985).

The Court of Appeals for the Ninth Circuit has long recognized that “[t]he bankruptcy court has great latitude in approving compromise agreements.” *Woodson v. Fireman’s Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). “The purpose of a compromise agreement is to allow the [Trustee] and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims.” *Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1380-81 (9th Cir. 1986), cert. denied 479 U.S. 854 (1986). Accordingly, in approving a settlement agreement, the court need not conduct an exhaustive investigation of the claims sought to be compromised. See *United States v. Alaska National Bank (In re Walsh Constr., Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). Rather, it is sufficient that the court find that the settlement was negotiated in good faith and is reasonable, fair, and equitable. See *In re A & C Properties*, 784 F.2d at 1381.

26 | //

27 | //

1 The Court of Appeals for the Ninth Circuit has identified the following factors for
2 consideration in determining whether a proposed settlement agreement is reasonable, fair, and
3 equitable:

- 4 (a) the probability of success in the litigation;
5 (b) the difficulties, if any, to be encountered in the matter of collection;
6 (c) the complexity of the litigation involved, and the expense, inconvenience, and
7 delay necessarily attending it;
8 (d) the paramount interest of the creditors.

9 *In re A & C Properties*, 784 F.2d at 1381.

10 A court should not substitute its own judgment for the judgment of the trustee. *Matter of*
11 *Carla Leather, Inc.*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984). A court, in reviewing a proposed
12 settlement, is not to decide the numerous questions of law and fact but rather to canvass the issues to
13 determine whether the settlement falls below the lowest point in the range of reasonableness. *In re*
14 *W.T. Grant & Co.*, 699 F.2d 599, 608 (2nd Cir. 1983), accord, *Newman v. Stein*, 464 F.2d 689, 693
15 (2nd Cir. 1972). The court should not necessarily conduct a “mini-trial” on the merits of the
16 underlying cause of action. *Matter of Walsh Const., Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982); *In re*
17 *Blair*, 538 F.2d 849 (9th Cir. 1976). “It is well established that compromises are favored in
18 bankruptcy.” *In re Lee Way Holding Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990).

19 For all of the reasons set forth above and further explained below, Trustee believes the
20 Agreement is reasonable, fair and equitable, and in the best interests of the Estate and its creditors. A
21 review of the factors outlined below further supports approval of the Agreement.

22 **A. PROBABILITY OF SUCCESS IN LITIGATION**

23 Trustee does not anticipate litigation to be necessary in this matter. (Marshack Decl. ¶¶ 6-7).
24 At its core, Trustee’s Motion is essentially a settlement without a stipulated judgment. Proving the
25 necessity of returning the excess LPG funds held by Optimum to Trustee presents no difficulty, and
26 avoiding the cost to the Estate of doing so is the intent of the Agreement and Trustee’s Motion. (*Id.*)
27 Optimum and Trustee are in full agreement about the appropriate disposition of funds implicated by
28

1 this Motion. (*Id.*) There are no other interested parties, and Trustee does not anticipate any objection
2 to the approval of the Agreement. Thus, this factor favors approving the Agreement.

3 **B. DIFFICULTIES IN COLLECTION**

4 As noted, there are no remaining controversies in this matter between Trustee and Optimum.
5 (Marshack Decl. ¶ 7). Once the Agreement is approved, the parties fully intend to timely perform
6 their obligations under the Agreement as set forth herein. Barring any unforeseen obstacles, there
7 should be no difficulty in collections. Thus, this factor weighs in favor of approving the Agreement.

8 **C. COMPLEXITY OF LITIGATION**

9 The issues involved in the Agreement are straightforward. The amounts pulled and/or held by
10 Optimum has been established through accounting records. (Optimum Decl.; Freedman Decl. at ¶ 2).
11 As there is full agreement between Trustee and Optimum on all relevant facts as well as full
12 agreement on the appropriate disposition of the LPG estate funds, there is little to no complexity in
13 the issues presented. In fact, the Agreement is purposefully limited in scope so as to minimize the
14 possibility of unwarranted complications. As such, this factor weighs in favor of approving the
15 Agreement.

16 **D. BEST INTEREST OF CREDITORS**

17 Approving the Agreement is in the best interest of LPG's creditors because Trustee will be
18 recovering one-hundred percent (100%) of Debtor's assets held by Optimum after contractual
19 chargebacks are deducted. (Marshack Decl. at ¶¶ 6-7; Optimum Decl.) Further, providing Optimum
20 with access to CLG contracts in order to respond to client chargeback and disputes stands to maximize
21 the recovery of LPG assets during the Optimum Holdback period. (Marshack Decl. ¶ 7). Approving
22 the Agreement, therefore, guarantees an infusion of capital to the Bankruptcy Estate that will be
23 distributed to Debtor's creditors without the delay or need to expend Estate funds through litigation.
24 Trustee submits that the Agreement represents a valid exercise of his business judgment, is fair and
25 reasonable, and in the best interests of Debtor's creditors. Thus, this factor weighs in favor of
26 approving the Agreement.

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V.

**LPG ASSETS ACQUIRED BY OPTIMUM AFTER THE PETITION DATE ARE FREE
AND CLEAR**

Bankruptcy Code section 552(a) provides that “property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.” 11 U.S.C. § 552(a). Generally, courts view 11 U.S.C. § 552(a) broadly. *See also Alliance Capital Management L.P. v. County of Orange (In re County of Orange)*, 189 B.R. 499, 503 (C.D. Cal. 1995).

Here, the funds held by Optimum as a result of processing CLG’s ACH transactions totaling \$1,000,605.91 were acquired post-petition. (Marshack Decl. Exh. A, ¶ C; Freedman Decl. at ¶¶ 2-3.) These funds are derived from post-petition ACH debits initiated by Optimum on LPG clients that were fraudulently transferred to CLG. *See, e.g., CapCall, LLC v. Foster (In re Shoot the Moon, LLC)*, 635 B.R. 797, 830 (Bankr. D. Mont. 2021), citing 11 U.S.C. § 552. The approximate \$800,604.91 and any remainder of the \$200,000 to be held by Optimum to cover chargebacks and/or disputes pursuant to the Agreement do not, therefore, represent proceeds, products, offspring, or profits from any secured and perfected security interest that existed pre-petition. 11 U.S.C. § 552(b). As such, this Court should order that these funds are free and clear of any and all secured liens.

VI.

THE SETTLEMENT IS A RESULT OF GOOD FAITH ARMS' LENGTH NEGOTIATIONS

Trustee further submits that the Agreement results from a good faith and arms' length negotiation between Trustee and Optimum. (Marshack Decl. ¶ 8; Freedman Decl. at ¶¶ 2-3.) The Agreement is not the result of any collusion between Trustee, Optimum, or any other party. (*Id.*)

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VII.

CONCLUSION

The Trustee respectfully requests that the Bankruptcy Court enter an order providing for the following relief:

- (a) Granting the motion;
 - (b) Approving the terms of the Agreement, a copy of which is attached as Exhibit A to the Declaration of Richard Marshack filed concurrently herewith, and authorizing Trustee to enter into the Agreement;
 - (c) A finding that Optimum shall turn over \$1,000,605.91 as set forth in the Agreement held by Optimum, which are free of secured creditor liens;
 - (d) Of the \$1,000,605.91 to be turned over by Optimum, \$200,000 shall be held in Trust by Optimum during the Optimum Recoupment period to cover any chargebacks and/or disputes with any remaining portion thereof turned over to the Trustee at the end of the optimum Recoupment period pursuant to the terms of the Agreement; and
 - (e) For such other relief as this Court may deem just and proper.

Dated: August 22, 2024

Respectfully submitted,

DINSMORE & SHOHL LLP

By:/s/ *Jeremy B. Freedman*
Christopher B. Ghio
Jeremy B. Freedman
Special Counsel to Richard A. Marshack
Chapter 11 Trustee for the Bankruptcy Estate
of The Litigation Practice Group PC

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 655 W. Broadway, Suite 800, San Diego, California 92101

A true and correct copy of the foregoing document: **NOTICE OF CHAPTER 11 TRUSTEE, RICHARD A. MARSHACK'S MOTION AND MOTION FOR ORDER APPROVING COMPROMISE OF CONTROVERSY PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 AS TO DEFENDANT OPTIMUMBANK AND OPTIMUMBANK HOLDINGS, INC.; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On August 22, 2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On August 22, 2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

YCIR Inc.
Hector Ocegueda
535 S Barranca St #4
Covina, CA 91723

JUDGE'S COPY

The Honorable Scott C. Clarkson
United States Bankruptcy Court
Central District of California
Ronald Reagan Federal Building and Courthouse
411 West Fourth Street, Suite 5130 / Courtroom 5C
Santa Ana, CA 92701-4593

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on August 22, 2024, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

August 22, 2024
Date

Bonnie Connolly
Printed Name

/s/ Bonnie Connolly
Signature

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